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No. 90-404

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES and ILLINOIS DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

ILLINOIS NURSES ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First Judicial District

RESPONDENT ILLINOIS NURSES ASSOCIATION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Are there valid considerations for granting a writ of certiorari in this matter?
2. Where a State retains the right and has the obligation to control the performance of non-delegable, constitutionally mandated work it has contracted with a private company to provide on its behalf, can a state labor relations board assume jurisdiction over the company and its employees?
3. Have Petitioners waived their pre-emption claim?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
ADDITIONAL STATUTORY PROVISION	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
REASONS FOR DENYING THE WRIT	4
I. CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI ARE NOT PRESENT	4
II. THE APPELLATE COURT'S DECISION DOES NOT CONFLICT WITH FEDERAL LAW	5
A. The Constitutional And Statutory Obligation Of The DOC To Provide Adequate Medical Care To Incarcerated Individuals Mandated The Illinois Appellate Court's Decision That The RNs Were DOC Employees and Systems Was DOC's Agent	5
B. The Illinois Appellate Court Appropriately Applied The Agency Test When It Determined The Shawnee RNs Were Employed By The Illinois DOC And Systems Was DOC's Agent	7
C. This Case Does Not Present A Federal Pre-Emption Issue	9
III. PETITIONERS' DILATORINESS WAIVED ANY PRE-EMPTION CLAIM	10
CONCLUSION	11

TABLE OF CONTENTS—Continued

APPENDIX Page

Charge Against Employer Filed by the Illinois Nurses Association with the Illinois State Labor Relations Board (June 24, 1985) 1a

Additional Statute Involved 4a

TABLE OF AUTHORITIES

CASES

	Page
Bob Neal Pontiac-Toyota, Inc. v. The Industrial Commission, 89 Ill. 2d 403, 433 N.E.2d 678 (1982)	8
Correctional Medical Systems, Inc., 299 NLRB No. 95 (1990)	3, 8
Cory Corp. v. Fitzgerald, 403 Ill. 409, 86 N.E.2d 363 (1949)	5
Dynaelectron Corp., Aerospace Operations Division, 286 NLRB No. 28 (1987)	9
Illinois Nurses Assn. v. ISLRB, 156 Ill. App. 3d 841, 509 N.E.2d 1307 (1987)	2
Illinois Nurses Assn. v. ISLRB, 196 Ill. App. 3d 576, 554 N.E.2d 404 (1990)	3, 7, 9
International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986)	11
Kelley v. Southern Pacific Co., 419 U.S. 318 (1974)	7
Koba Associates, Inc., 289 NLRB No. 33 (1988)	9
Kouba v. East Joliet Bank, 135 Ill. App. 3d 264, 481 N.E.2d 325 (1985)	8
Long Stretch Youth Home, Inc., 280 NLRB 678 (1986)	3, 9
Maryland v. Baltimore Radio Show, 388 U.S. 912 (1950)	4
Merlo v. Public Service Company of Northern Illinois, 381 Ill. 300, 45 N.E. 665 (1942)	8
National Transportation Service, Inc., 240 NLRB 565 (1979)	8
NLRB v. United Insurance Co., 390 U.S. 254 (1968)	7
Old Dominion Security, Inc., 289 NLRB No. 18 (1988)	9
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	9, 10
West v. Atkins, 487 U.S. 42 (1988)	5, 6
Wilkey v. The Illinois Racing Board, 96 Ill. 2d 245, 449 N.E.2d 843 (1983)	5

TABLE OF AUTHORITIES—Continued

STATUTES	Page
29 U.S.C. § 152(3)	7
Ill. Rev. Stat. ch. 38, ¶ 1003-7-2(d) (1985)	5
Ill. Rev. Stat. ch. 48, ¶ 1603(n) (1989)	1, 2, 7
Ill. Rev. Stat. ch. 48, ¶ 1603(o) (1989)	2
RULE	
Sup. Ct. R. 10	4
TEXTS	
Restatement (Second) of Agency (1958)	7
C. J. Morris, *The Developing Labor Law* (2d ed. 1983)	9

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RESPONDENT ILLINOIS NURSES ASSOCIATION'S BRIEF IN OPPOSITION

ADDITIONAL STATUTORY PROVISION

Section 3(n) of the Illinois Public Labor Relations Act, Ill. Rev. Stat. ch. 48 ¶ 1603(n) (1989).

STATEMENT OF THE CASE

On June 24, 1985, the Illinois Nurses Association, "INA", filed an unfair labor practice charge with the Illinois State Labor Relations Board, "ISLRB". (R.

C-3&80)[1] (App. pp. 1a-3a) The charge alleged the Illinois Department of Corrections, "DOC", committed an unfair labor practice by failing to apply the terms of a collective bargaining agreement between the INA and the State of Illinois, to registered nurses, "RNs", employed at the DOC's Shawnee Correctional Center, "Shawnee". (App. pp. 1a-3a) The DOC took the position that the RNs were employed by a private employer, Correctional Medical Systems, Inc., "Systems". The INA contended the subcontract between the DOC and Systems evidenced a joint-employer relationship, making the RNs public employees and bringing Systems within the Illinois Public Labor Relations Act's, "IPLRA," definition of "public employer". (Ill. Rev. Stat. ch. 48, ¶ 1603(n) & (o) 1989).)

The ISLRB dismissed the charge on October 24, 1985, holding it had no jurisdiction over Systems. (R. C-35) The Illinois Appellate Court for the First District reversed and remanded the dismissal instructing the ISLRB to hold an evidentiary hearing on the issue, whether "[Systems], by virtue of its agency status with the State, was a public employer". *Illinois Nurses Assn. v. ISLRB*, 156 Ill. App. 3d 841, 843, 509 N.E.2d 1307, 1309 (1987). (R. C-75-77)

A two-day evidentiary hearing was held before a hearing officer of the ISLRB on September 8 and 9, 1987. (R. 1-1026) The hearing officer found that although Systems was a joint-employer with the DOC of the RNs and would not be capable of engaging in effective and meaningful bargaining without the DOC, Systems was not an agent of the DOC; and, therefore, he dismissed the charge. (R. 1146-1150) On July 20, 1988, the ISLRB upheld the dismissal. (R. 1318)

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[1] The record on appeal contains duplicate numbering. Documents up to the administrative hearing are designated "R. C". Beginning with the transcript of the administrative hearing, the remainder of the record is designated "R.".

On March 30, 1990, the Illinois Appellate Court for the First District, again reversed and remanded the ISLRB's decision holding Systems to be both an agent of and a joint-employer with the DOC. *Illinois Nurses Assn. v. ISLRB*, 196 Ill. App. 3d 576, 583, 554 N.E.2d 404, 409 (1990). The Illinois Supreme Court denied the ISLRB's and Systems' petitions for appeal on June 1, 1990, and their motions for reconsideration on July 19, 1990.

The ISLRB, after the Illinois Supreme Court's first denial, then filed a petition for an advisory opinion with the National Labor Relations Board, "NLRB". The NLRB, on August 31, 1990, advised it would assert jurisdiction over Systems based on its decision in *Long Stretch Youth Home*, 280 NLRB 678 (1986). *Correctional Medical Systems, Inc.*, 299 NLRB No. 95 (1990).

SUMMARY OF THE ARGUMENT

I

A number of reasons exist for this Court to deny the petition for writ of certiorari.

II

States, including Illinois, have a constitutional duty to provide adequate medical care to incarcerated individuals. The right to control the manner in which the medical care is performed rests with the State. As such, individuals who perform the work are "servants" of the State. When the Illinois DOC contracted with a private company to provide health care at Shawnee, the company became an agent of the DOC and the company's employees were "servants" of the DOC.

Pursuant to the IPLRA's definitions of public employer and employee, the ISLRB had jurisdiction over the company and individuals providing medical care at Shawnee. Since the parties to this matter are not covered by the

National Labor Relations Act, "NLRA", no pre-emption issue exists.

III

This case went through two administrative proceedings and two appeals to the Illinois appellate court without pre-emption being raised as an issue. Raising it now is not timely, and, therefore, Petitioners waived the pre-emption claim.

REASONS FOR DENYING THE WRIT

I. CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI ARE NOT PRESENT

Rule 10 provides the Court with certain considerations governing review on a petition for certiorari. Sup. Ct. R. 10. None of the considerations set forth are met in this case and there are no "special and important reasons" for granting the writ. *Id.*

Contrary to Petitioners' assertion, there is no conflict between the appellate court's decision and decisions of this Court, United States Courts of Appeals, or the NLRB. As is explained below, the parties to this matter are not covered by federal labor law. This case concerns a fact-specific subcontract and the employment relationship between a state agency, a private company, their employees and a collective bargaining representative. It is a matter of a state appellate court applying common and state statutory law to the specific contract between the state agency and the company.

Justice Frankfurter set forth a number of reasons this Court may deny a petition for certiorari in *Maryland v. Baltimore Radio Show*, 388 U.S. 912 (1950). At least three reasons apply here, including that there is no judgment of a State court of last resort and that the decision below is supportable as a matter of State law and decisions of this Court. *Id.* at 918.

Third, Petitioners' claim notwithstanding, the decision of the appellate court remanding this cause to the

ISRLB is not a final judgment. *Wilkey v. The Illinois Racing Board*, 96 Ill. 2d 245, 449 N.E.2d 843 (1983). The appellate court's remand instructed the ISLRB to hear the merits of the INA's unfair labor practice charge. Illinois law instructs, ". . . where a cause is remanded for a new trial or other further proceedings involving disputed questions of law or fact, the judgment of the Appellate Court is not of a final character." *Cory Corp. v. Fitzgerald*, 403 Ill. 409, 414, 86 N.E.2d 363, 366 (1949).

The Illinois Supreme Court twice denied Petitioners' request to hear this matter. The absence of any reason for review requires this Court do the same.

II. THE APPELLATE COURT'S DECISION DOES NOT CONFLICT WITH FEDERAL LAW

A. The Constitutional And Statutory Obligation Of The DOC To Provide Adequate Medical Care To Incarcerated Individuals Mandated The Illinois Appellate Court's Decision That The RNs Were DOC Employees And Systems Was DOC's Agent.

The Illinois DOC has an obligation to provide adequate medical care to incarcerated individuals housed at its correctional facilities. (Ill. Rev. Stat. ch. 38, ¶ 1003-7-2(d) (1985).) Contracting-out such medical care does not relieve the State of its constitutional duty. *West v. Atkins*, 487 U.S. 42 (1988). Although that case was a § 1983 action brought by a prisoner against North Carolina, the rule enunciated by the Court applies with equal force to the appellate court's analysis in the present matter. Reversing the Fourth Circuit's holding that a contract physician was not acting under color of state law in treating the inmate's injury, the Court stated:

> In the State's employ, respondent worked as a physician at the prison hospital fully vested with state authority to fulfill essential aspects of the duty,

> placed on the State by the Eighth Amendment and state law, to provide essential medical care to those the State had incarcerated.

Id. at 57. Similarly, the RNs who provide medical care to the inmates at Shawnee are in the employ of DOC and are state actors. By statute and as a matter of constitutional duty, the Shawnee RNs are responsible to the DOC for the work they perform on behalf of the State of Illinois. Thus, they work under the supervision of the DOC's medical director and the rules he promulgated. (R. 218-223, 381-446)

As *West* dictates, the DOC has the absolute obligation to control the manner in which the medical care is provided at Shawnee and cannot delegate this responsibility to another, whether to one contract physician or a company whose only purpose is to contract with states to provide medical services to their correctional facilities. Therefore, a private entity, such as Systems, which contracts with the DOC to provide medical services, does so on behalf of and under the supervision and control of the DOC. The individuals performing the work of the contractual entity owe a duty to provide adequate medical care to the DOC and the inmates, not the contractor. It is as if the contractor is merely an intermediate supervisor employed by the DOC to supervise the work, since the right and duty to perform the work remains at all times with the DOC.

The appellate court's conclusion that the DOC was the employer of the RNs and Systems an agent of the DOC was the correct application of constitutional and statutory law.

B. The Illinois Appellate Court Appropriately Applied The Agency Test When It Determined The Shawnee RNs Were Employed By The Illinois DOC And Systems Was DOC's Agent.

Both the NLRA and the IPLRA define "employee". (29 U.S.C. § 152(3); Ill. Rev. Stat. ch. 48, ¶ 1603(n) (1989). To determine whether an individual is an employee of an employer or an independent contractor, the common-law test of agency is used. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968).

In finding the DOC was the RNs' employer and Systems was DOC's agent, the appellate court applied this common-law test to the facts of the case: ". . . the right to control [the Shawnee nurses] is by the agreement and law in the DOC, not Systems." 196 Ill. App. 3d at 582, 554 N.E.2d at 408. *Restatement (Second) of Agency* § 220 (1958) defines "servant (employee)" as:

> a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or *right of control.* (Emphasis added.)

This test is broadly applied by both federal and Illinois courts at common-law and in numerous statutory contexts, including the NLRA.

In a NLRA case, *NLRB v. United Insurance Co.*, 390 U.S. at 256, this Court said, ". . . there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor." Under the Federal Employer's Liability Act, this Court found the critical determinant to establish an employment or master-servant relationship was the "control or right to control" the performance of the work. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325 (1974).

Similarly, Illinois courts utilize the same test for purposes of construing state statutes and applying the com-

mon law. For instance, in *Bob Neal Pontiac-Toyota, Inc. v. The Industrial Commission*, 89 Ill. 2d 403, 410, 433 N.E.2d 678, 681 (1982), the Illinois Supreme Court found that among various factors to be considered in resolving a worker's status under the Illinois Worker's Compensation Act, ". . . the right to control the manner in which the work is done is the most important. (Citations omitted.)" See also: *Merlo v. Public Service Company of Northern Illinois*, 381 Ill. 300, 45 N.E. 665 (1942) (negligence); and, *Kouba v. East Joliet Bank*, 135 Ill. App. 3d 264, 481 N.E.2d 325 (1985) (wrongful repossession).

The appellate court, in the present case, correctly used the same test to interpret the IPLRA and found the Shawnee RNs were employees of the DOC. The right to control the performance of the work contracted to Systems was vested in the DOC. As such, the RNs were public employees and Systems was the DOC's agent.

The NLRB recently issued an advisory opinion in this matter and determined it would assert jurisdiction over Systems. *Correctional Medical Systems*, 299 NLRB No. 95 (1990). In *National Transportation Service, Inc.*, 240 NLRB 565 (1979), the NLRB developed a two-prong test for deciding whether or not to assert jurisdiction in cases involving both a governmental entity and a private employer. Part one of the test required defining the employer. If part one was met, part two required answering whether the "degree of control" over subjects of bargaining retained by the employer was sufficient to enable it to negotiate with a labor organization representing the employees.

In its advisory opinion, the NLRB made the same error committed by the ISLRB in its administrative decision—both boards began their analysis with part two, the "degree of control" test, rather than first defining the employer. This fundamental error was recognized by the appellate court when it said, ". . . the initial task is

to define the employer before applying the degree of control test." 196 Ill. App. 3d at 581, 554 N.E.2d at 407. By improperly applying the test, both boards came to the same erroneous conclusion.

C. This Case Does Not Present A Federal Pre-emption Issue.

This case concerns whether or not Illinois has jurisdiction, including IPLRA jurisdiction, over the providers of medical care at its correctional facilities. It does not concern activities or conduct arguably within the scope of the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The appellate court found the duty to provide medical care rendered by the Shawnee RNs and Systems was subject to the state's regulatory power, while "[t]he touchstone of the pre-emption doctrine is conflict, actual or potential, between two systems which regulate labor activity." C. J. Morris, *The Developing Labor Law* (2d ed. 1983) at 1509. A pre-emption issue does not exist, if, as here, the state and federal systems regulate separate and mutually exclusive parties.

Petitioners cite a number of cases relating to the NLRB's assertion of jurisdiction over private employers with ties to governmental entities. Yet, none even remotely pertain to companies performing non-delegable duties which constitutionally and statutorily are vested exclusively in the states. For instance: *Koba Associates, Inc.*, 289 NLRB No. 33 (1988) (company provided personnel to maintain the Drug Enforcement Agency's drug information system); *Old Dominion Security, Inc.*, 289 NLRB No. 18 (1988) (company provided security services to the U.S. Navy); *Dynaelectron Corp., Aerospace Operations Division*, 286 NLRB No. 28 (1987) (contractor provided aircraft maintenance to the U.S. Navy); and, *Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986) (employer licensed by Maryland Social Services

Administration provided residential facility for teenage boys).

Even if the *Garmon* doctrine were arguably applicable, the obligation of the DOC to maintain control over the medical care provided at its facilities:

> touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

359 U.S. at 244. This matter would clearly fall within the above-quoted exception to the pre-emption doctrine.

III. PETITIONERS' DILATORINESS WAIVED ANY PRE-EMPTION CLAIM

Petitioners' claim that the appellate court's March 30, 1990 decision raised a pre-emption claim for the first time is disingenuous. Respondent filed its unfair labor practice charge in June 1985. Petitioner, ISLRB, dismissed the charge without ever raising pre-emption as an issue. Respondent appealed to the appellate court, briefs were filed and oral arguments were made. The ISLRB never raised the pre-emption doctrine.

The court remanded the case for an evidentiary hearing. A two-day hearing was held in September 1987. The ISLRB, again, dismissed the charge on July 20, 1988, but the pre-emption doctrine was not the basis for the dismissal, nor was it raised. Respondent, again, appealed to the appellate court. The parties, including Systems as intervenor, filed briefs and made oral arguments. Federal pre-emption was not an issue.

After the second time the court ruled against the ISLRB and Systems, pre-emption was first raised in petitions to the Illinois Supreme Court in April 1990; five years, two administrative decisions and two appeals after the INA originally filed the charge. Had Petitioners genuinely believed pre-emption was an issue, they would

have raised it long before their petitions to the Illinois Supreme Court. Such dilatoriness does not evidence a good faith belief in their theory, but does evidence further attempts to delay a final resolution of this matter, as well as improper forum shopping. Petitioners' conduct should not be countenanced by the Court.

Petitioners' actions go far beyond the union's delay in *International Longshoremen's Assn. v. Davis*, 476 U.S. 380 (1986), and distinguish that case from this one. Chief Justice Rehnquist's caution in that case has been realized here "by allowing a defendant to save its pre-emption claim until after it sees the verdict this . . . poses a sufficient threat to orderly judicial proceedings." 476 U.S. at 399. Petitioners have not timely nor seriously raised a pre-emption issue.

CONCLUSION

Based on these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Illinois Nurses Association

October 3, 1990

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APPENDIX

APPENDIX

STATE OF ILLINOIS
ILLINOIS STATE LABOR RELATIONS BOARD
320 West Washington Street, Suite 500
Springfield, Illinois 62701
(217) 785-3155

CHARGE AGAINST EMPLOYER

Do Not Write in This Space

Case Number

Date Filed

June 24, 1985

INSTRUCTIONS:

In accordance with the Illinois Public Labor Relations Act (*Ill. Rev. Stat.* ch. 48, § 1601 et seq.) and the Rules and Regulations of the Illinois Labor Relations Boards (80 *Ill. Adm. Code* § 1200.20 and § 1220.20), the following information is required. Submit an original and one (1) copy of this charge to the Illinois State Labor Relations Board. If more space is required for any item, attach additional sheet(s), numbering items accordingly.

1. Employer Against Whom Charge Is Brought

Name
State of Illinois; Department of Corrections
Telephone Number
(217) 522-2666

Address
1301 Concordia Court; Springfield, Illinois
Zip Code
62702

2. Employer Representative
Michael P. Lane, Director
Telephone Number
(217) 522-2666

Address
1301 Concordia Court; Springfield, Illinois
Zip Code
62702

3. It is alleged that the above-named employer has engaged in (an) unfair labor practice(s) within the meaning of Section 10(a), subsection(s) (1) (2) & (4) of the Illinois Public Labor Relations Act.

4. Basis of Charge (Specify facts, names, addresses, sites, dates, etc.) Use reverse side if necessary.

The Department of Corrections refused to bargain with the Illinois Nurses Association, the exclusive representative of nurses I, II, III & IV, nursing education assistant coordinators, and restorative program consultants regarding wages, hours and other conditions of employment for certain State of Illinois bargaining unit employees employed at Shawnee Correctional Center which the State of Illinois, Department of Corrections claims to be working for a sub-contractor but which is really a joint-employer with the State of Illinois. The Department of Corrections also refuses to apply the terms and conditions of the collective bargaining agreement between the State of Illinois and the Illinois Nurses Association to these bargaining unit employees. The violations occurred on or about March 1, 1985.

5. Relief or Remedy Sought by Charging Party

Make a determination that the Department of Corrections has committed an unfair labor practice and order it to cease and desist. Further, issue an order requiring the Department to apply the terms and con-

ditions of the RC-23 Illinois Nurses Association/State of Illinois contract to the bargaining unit employees employed at the Shawnee Correctional Center, now and retroactive to their date of hire.

6. Charging Party Name

Illinois Nurses Association
Telephone Number
(312) 236-9708
Address
Suite 2520, 20 North Wacker Drive; Chicago, Illinois
Zip Code
60606

7. Charging Party Representative

Sally A. Stix
Telephone Number
(312) 977-1125
Address
188 West Randolph, Suite 727; Chicago, Illinois
Zip Code
60601

I have read the above charge and all attachments. The statements contained therein are true to the best of my knowledge and belief.

By

Signature of Person or Representative

Address 188 West Randolph, Suite 727
Chicago, Illinois 60601

Title Attorney for Illinois Nurses Association

Telephone Number (312) 977-1125

Date June 24, 1985

ILLINOIS PUBLIC LABOR RELATIONS ACT (IPLRA)

Ill. Rev. Stat. ch. 48, ¶ 1603(n):

(n) "Public employee" or "employee, for the purposes of this Act, means any individual employed by a public employer, including interns and residents at public hospitals, but excluding all of the following: employees of the General Assembly of the State of Illinois: elected officials; executive heads of a department; members of boards or commissions; employees of any agency, board or commission created by this statute; employees appointed to State positions of a temporary or emergency nature; all employees of school districts and higher education institutions; managerial employees; short-term employees; confidential employees; independent contractors; and supervisors except as provided in this Act.